

FERC approves rule for siting transmission in national interest corridors

With Commissioner Suedeen Kelly dissenting in part, FERC on Nov. 16 approved a final rule governing the commission's backstop authority to site interstate electric transmission facilities in national interest corridors as designated under the Energy Policy Act of 2005.

FERC Chairman Joseph Kelliher insisted at the open commission meeting on Nov. 16 that the final rule "was very respectful of state authority. As a practical reality, I would expect states will continue to site the vast bulk of transmission projects."

Commissioners Jon Wellinghoff, Marc Spitzer and Philip Moeller felt that the commission struck the right balance between the interests of states and the need for new transmission and argued that FERC's backstop authority will be used only sparingly.

"I hope and expect that transmission siting proceedings under this rule will be rare," Wellinghoff said.

Kelly disagreed with the majority on one point, arguing that with the new rule, FERC is making "a significant inroad" into traditional state transmission siting authority. "This is preemption," she said.

Kelly said that she supported the proposed rule, which was issued in June, because only certain limited circumstances would give rise to FERC backstop authority. "This rule should be respectful of state jurisdiction. Unfortunately, in one critical area, it is not," she said.

Kelly's disagreement is over how a state's action to "withhold approval" of a proposed transmission line is interpreted in the rule. Kelliher said there was a question of whether the term means state failure to act, or state failure to act on an application as well as an affirmative action by a state to deny an application. FERC's review of an application to site transmission in a national interest corridor cannot occur until after the state action has occurred.

"We interpret this term using the usual rules of statutory construction, and conclude the most reasonable interpretation is that the term encompasses both state failure to act and denial," Kelliher said. "'Withhold' and 'denial' are not different concepts."

However, Kelly contends that the final rule triggers the commission's permitting authority when, among other things, a state lawfully denies a permit application. "I could not disagree more with this interpretation," she said. "Most significantly, it preempts the state permitting process."

Kelly argued that the majority interpretation in the final rule gives the commission jurisdiction to approve the siting of a transmission line under federal law that a state has

lawfully denied under state law. "Like me, I expect many today will be surprised by the commission's decision," she added.

Noting that states have always had exclusive jurisdiction over transmission siting, Kelly argued that in passing the Energy Policy Act, Congress "carved out a limited role for the federal government in the area of transmission siting."

FERC permits limited to DOE transmission corridors

Under the rule, FERC can only issue a construction permit for transmission projects located in national interest electric transmission corridors, as designated by the Department of Energy. No corridors have been established as yet. Even in national interest corridors, FERC can only issue a permit where states do not have authority to site transmission facilities or consider the interstate benefits of a project, where an applicant does not qualify for siting under state law, or where the state siting body has withheld approval for more than a year or conditioned approval in a particular manner.

Kelliher said that the biggest change from the proposed rule involves when a project developer can initiate prefiling at the commission. Under the proposed rule, an applicant was barred from making a formal application for a federal construction permit until one year after initiation of a state proceeding. However, prefiling could be started earlier and could overlap with the state siting proceeding. In response to concerns of state regulators, the final rule bars both a formal application and the initiation of prefiling within one year of initiation of a state proceeding.

"We actually could have gone much further," Kelliher said, explaining that the commission could have begun its prefiling process at the same time a state review was taking place.

The prefiling process that FERC intends to use for electric transmission facilities to be located in national interest corridors will be similar to processes the commission already uses when it handles applications for hydroelectric facilities and natural gas pipelines.

"Pre-filing has not been controversial in the hydroelectric or natural gas context," Kelliher said. "In fact, it has been popular." (RM06-12)